
Clean Water Act Section 404 Compliance and the Nationwide Permit Program

By Tim Jordan, Senior Biologist/Permits Coordinator

Proponents of construction, utility, or development projects that include disturbance within streams, including the typical ephemeral variety found throughout the American Southwest, are required to conduct the stream disturbance in compliance with the Clean Water Act (CWA) of 1972. But what exactly constitutes “stream disturbance,” what exactly is a “stream,” and what specific type of permit is necessary?

Clean Water Act Section 404

The “stream disturbance” mentioned above is more accurately referred to as discharge, which consists of either removing material (dredging) or placing material (filling) within the jurisdictional limits of a stream, lake, pond, wetland, or other body of water. The jurisdictional limits of a stream are referred to as its Ordinary High Water Marks (OHWMs), which are usually evidenced by field indicators such as a change in substrate, cut banks, or a debris line along the bank. The U.S. Army Corps of Engineers (USACE) issues permits, under the authority of Section 404 of the CWA, for the discharge of dredge and fill materials within Waters of the U.S. (WUS).

USACE provided basic regulatory guidance regarding the extent of their geographical jurisdiction over streams, or WUS, in 2008 by defining WUS as “naturally occurring traditional navigable waters, relatively permanent waters, and/or ephemeral waters with a significant nexus to traditional navigable waters.” Agricultural water conveyance systems, such as irrigation canals and ditches, which are humanmade and constructed wholly in uplands, are typically only considered jurisdictional if they are relatively permanent waters. The most recent guidance on the topic

states that “relatively permanent waters typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).” Conversely, humanmade drainages constructed solely in uplands that are not relatively permanent waters are generally not jurisdictional.

In an attempt to clarify this somewhat vague and subjective definition of WUS and what their jurisdictional limits really are, USACE released the “Clean Water Rule” on May 27, 2015, which was slated to go into effect on August 28 of that same year. We will not delve into the specifics of the rule in this article, but it was blocked by the U.S. Court for the 6th Circuit on October 9, 2015, over concerns that USACE might be overreaching their authority; subsequently, the convoluted 2008 guidance regarding WUS remains in effect.



Traditional navigable waters, Waters of the United States, or...?

Nationwide Permit Program

Oddly enough, especially with the tedious definition of what is and isn’t jurisdictional, the objective of the CWA is simplicity itself: “... to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Following this straightforward thread, and to streamline the permitting process for activities with little potential to adversely impact WUS, USACE created the Nationwide Permit (NWP) program as an alternative to their general, or individual, permitting program. Individual permits typically have much

lengthier timeframes for obtaining authorization, in part because applicants must demonstrate National Environmental Policy Act (NEPA) compliance, which includes the completion of an alternatives analysis. However, in some cases, an individual permit is the only choice for larger projects with large amounts of associated discharges within WUS.

The NWP program consists of several categorical permits custom-designed for common construction activities, such as road building, installing utility lines, and residential and commercial development. Each permit places thresholds on the area of discharge in WUS and the total length of streambed loss allowed. For example, NWP #12, for Utility Line Activities, allows up to 0.5 acres of WUS loss for the installation of aerial electric lines and substations.

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As an aside, “loss” refers only to WUS that are adversely and permanently affected by filling, flooding, excavation, or drainage caused by a regulated activity. In CWA terms, the chemical, physical, and biological integrity of the WUS is what is lost. Temporary fills, such as those placed in a wash for access to a utility line, do not typically result in WUS loss, as long as the fills are removed following construction and the topography of the streambed is restored to its pre-construction condition.

Another way to avoid WUS loss during utility installations is to utilize directional boring at stream crossings rather than simply trenching straight across. Trenching construction includes both dredge and fill discharges when removing material to create the trench, placing

material next to the trench (sidecasting), and while backfilling the trench. But as long as the bore pits used while directionally boring a crossing are located a sufficient distance beyond the OHWMs of the crossing, there will be no discharge and no subsequent loss of WUS, temporary or permanent. In many cases, Section 404 permits are not needed for projects that use directional boring.

Nationwide Permit Renewal

USACE reviews, updates, and reissues NWPs on a five-year schedule. At the present time, the 2012 NWPs are in effect until March 18, 2017 and on June 1, 2016 USACE released the new 2017 NWPs for public comment. After the 2012 NWPs expire, activities can still occur under a 2012 permit as long as a contract is in place to start work and all discharge activities are completed by March 18, 2018 when the one-year “grandfather” period ends. If an extension is needed, a request will need to be submitted to USACE. It will be at their discretion to either extend the 2012 authorization or re-verify the activity under the new 2017 NWP.

How Tierra Can Help

Tierra’s environmental staff is very familiar with the Section 404 regulatory process. Our team has many years of experience conducting jurisdictional delineations of WUS across the Southwest and providing clients with the necessary documentation to obtain a NWP and individual permit authorizations for discharge.

If you are concerned about your project’s potential impacts on WUS and whether a Section 404 permit is required, Tierra’s team can help you assess your best approach. To learn more, contact our Environmental Compliance Lead, Theresa Knoblock, at (520) 319-2106 or by email at tknoblock@tierrarow.com.